U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 22 August 2003

BALCA Nos.: **2002-INA-201 and 202**
ETA Nos.: P2000-CA-09499431/JS and P2000-CA-09499430/JS

In the Matters of:

WOODLAND HILLS COUNTRY CLUB,
Employer,

on behalf of

ANTONIO OLAGUE GOMEZ AND JUAN OLAGUE GOMEZ
Aliens.

Appearance: David T. Acalin, Esquire
Los Angeles, California
For Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. These cases arise from the denial of applications for labor certification[1] filed by Woodland Hills Country Club[2] ("Employer") on behalf of two Aliens for the position of Golf-Club Repairer. The following decision is based on the record upon

[1] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(5)(A) and 20 C.F.R. Part 656. In this decision, ("AF") refers to the Appeal File relating to the Antonio Gomez application, while ("AF2") refers to the Appeal File relating to the Juan Gomez application.

[2] The Employer was initially identified as "Kerry Hopps PGA Golf Professional;" however, on March 28, 2002, Employer amended the applications to correct the Employer's name to "Woodland Hills Country Club." (AF 47; AF2 21-22).

which the Certifying Officer ("CO") denied certification and Employer's request for review. 20 C.F.R. 656.27(c). Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. 18.11.

STATEMENT OF THE CASE

Employer, a Golf Course, applied for permanent labor certification for two Golf-Club Repairers on March 6, 1998. (AF 54; AF2 27). Advertisements for the positions were published in the Daily News on March 4-6, 2000. (AF 32, 73; AF2 13, 14, 37). In a recruitment report in the Juan Gomez application, Employer reported that there were two applicants in response to the newspaper advertisement and three in response to a job posting. (AF2 37-38). The instant appeal relates to only one of the applicants, Patrick McNamara. In the report submitted by Employer's attorney, the entire discussion of the recruitment of Mr. McNamara is: "Applicant Patrick McNamara was called three times by the employer without response." (AF2 37). In a recruitment report in the Antonio Gomez application, Employer stated that it received no applicants as a result of the advertisement. (AF 65).

In a Notice of Findings dated February 27, 2002, the CO proposed to deny certification in both cases on the ground that Employer had unlawfully rejected a U.S. applicant in violation of 20 C.F.R. §§ 656.21(b)(6) and 656.24(b)(2)(ii). Specifically, the CO found that the U.S. applicant appeared to be qualified for the position based on the information in his application, and that Employer's recruitment report failed to provide sufficient information to show a good faith attempt to contact the applicant. The CO observed that the only information about attempted contact was that three attempts were made to telephone the applicant, and that there was no evidence that Employer attempted to write to the applicant. (AF 50-52; AF2 23-25). In the Antonio Gomez NOF, the CO also observed that, although Employer reported no applicants, there were two pending applications and Employer's obligation to attempt contact and recruit a potentially qualified U.S. worker was the same for both applications. (AF 51).

Employer filed virtually identical rebuttals on March 28, 2002. (AF 30-36; AF2 12-17). The rebuttals were internally inconsistent. A letter signed by Employer's manager of golf operations stated, in pertinent part:

> To the best of my recollection of the events and from the notes that I have, Mr. McNamara was not acceptable for this job due to the fact that after trying to contact three times, on three different days, by phone and leaving messages, I received no replies. Under any circumstances, I would not consider any applicant who does not respond to one phone call, let alone three.
>
> I did not have any information that would indicate that he would be leaving town or unavailable, so the only reason I can understand is that he was no longer interested.

(AF 35; AF2 15). The cover letters -- apparently written by Employer's attorney, but also signed by Employer's manager -- suggest that Employer may have actually interviewed the applicant, but also state that Employer was never able to reach the applicant by telephone despite repeated attempts:

> The employer wishes to allege denial of Patrick McNamara is purely based upon lawful and job-related reasons. It is valid and legitimate. During the initial personal interview conducted by the employer, the applicant confirmed that he did have some work experience in golf club repair service. However, he did not make a specific statement as to how detailed he could perform the job duties as a golf club repairman.
>
> In addition, the employer attempted to call the applicant several times, but to no avail. The employer was not able to reach the applicant. The applicant also failed to show interest in responding to all messages left.

> Thus the employer did not believe nor was the employer convinced that the applicant was truly interested in the position. Due to limited time span of recruitment, the employer could not wait forever for the applicant's response.

(AF 31; AF2 13).

The CO issued Final Determinations denying labor certification in both cases on April 4, 2002. (AF 10-12; AF2 9-11). Noting the inconsistencies in the rebuttal about whether the U.S. applicant had been interviewed, the absence of any details about the alleged interview, and the lack of any reference to an actual interview prior to the rebuttal, the CO found that the vague allusion to an interview in the rebuttal was not convincing evidence that an interview had taken place. The CO also observed that no specific information had been provided about the alleged attempts at telephone contact, such as when, how, with whom, or the content of any messages.

On April 30, 2002, Employer requested Board review in both cases. Attached to the requests was a letter from Employer's manager attempting to clarify her rebuttal letter. She stated that she did speak with the U.S. applicant "to interview him in person on the premises." They spoke for about 15 minutes, and she concluded that "he would have been suitable for the job position, however, he was not sure he wanted the job." The manager then stated that she tried calling the applicant three times, but only got his answering machine each time and no return calls. She therefore concluded that he was not interested in the position. (AF 4; AF2 4).

The CO treated the clarification letter as a request for reconsideration, but declined to consider it, stating a policy that "[m]otions for reconsideration will be entertained only with respect to issues which could not have been addressed in the rebuttal…" (AF 1; AF2 1). Employer did not submit a brief on appeal.

DISCUSSION

In *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*), the Board affirmed the longstanding holdings of BALCA panels to the effect that an employer who does no more than make unanswered phone calls or leave a message on an answering machine has not made a reasonable effort to contact the U.S. worker. The Board held that where the addresses were available for applicants, the employer should follow up with a letter. *Id.* Moreover, section 656.21(b)(6) provides that if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful job-related reasons. Similarly, section 656.21(j)(1)(iv) requires the employer to provide the local office with a written report of all post-application recruitment, which explains "with specificity, the lawful job-related reasons for not hiring each U.S. worker interviewed."

Based on the record before him when he made the Final Determination, the CO was fully justified in denying labor certification. The only ground stated for rejecting the U.S. applicant in the original recruitment report and Employer's own statement in the rebuttal was the unsuccessful attempts at telephone contact. There was no explanation at that point in the record that the unsuccessful attempts were a follow-up to an actual interview. Thus, based on what the CO was told, he was correct in concluding that Employer had not established a good faith recruitment effort. Moreover, the CO reasonably concluded that the allusion to an interview in the cover letter to the rebuttal was factually inconsistent with the other evidence of record and therefore not convincing evidence that an interview had taken place.

Employer's letter of clarification explains the mystery. Employer allegedly interviewed the applicant, found him to be qualified but hesitant to commit -- and the three unanswered telephone calls were in follow up to determine his interest in the position. However, the letter was provided after the rebuttal period as an attachment to the request for Board review. The CO treated the clarification letter as a request for

reconsideration, but declined to consider it because Employer could have presented this information at the time of rebuttal.

In *Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988) (*en banc*), the Board held that COs have the authority to reconsider a Final Determination. The Board wrote, however, that:

> This does not mean that the CO must reconsider a denial of certification whenever such a motion is filed. Nor must the CO accept the validity of evidence submitted on reconsideration and change the outcome of the case. But at least where, as here, the motion is grounded in allegations of oversight, omission or inadvertence by the CO which, if credible, would cast doubt upon the correctness of the Final Determination, and the Employer had no previous opportunity to argue its position or present evidence in support of its position, the CO should reconsider his or her decision.

(footnote omitted). A CO may deny a timely motion for reconsideration of a Final Determination because it is based on new evidence that should have been presented as part of the employer's rebuttal to the NOF. *Royal Antique Rugs, Inc.*, 90-INA-529 (Oct. 30, 1991).

In the instant case, Employer's clarification admitted that the prior statements may have been confusing, but expressed the hope that the CO would have contacted Employer if he had questions about the clarity of the facts. (AF 4; AF2 4). The burden of establishing entitlement to a labor certification, however, is not on the CO but on the employer. Here, the fault with the lack of clarity in the rebuttal and recruitment report is solely that of Employer. This is not a case in which the NOF failed to give the employer an adequate opportunity to rebut or cure the alleged defects. .*Miaofu Cao*, 1994-INA-53 (Mar. 14, 1996)(*en banc*). As the Board stated in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*): "Under the regulatory scheme of 20 C.F.R. Part 24, rebuttal following

the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." We cannot find that the CO abused his discretion when he refused to consider Employer's letter of clarification on reconsideration.

The Board has long held that evidence first submitted with the request for review will not be considered by the Board, *University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988), unless the employer did not have an opportunity to present all relevant evidence because the CO abused his or her discretion. *Compare Peter Hsieh*, 1988-INA-540 (Nov. 30, 1989) (improper to exclude evidence submitted after the FD where the NOF was ambiguous or lacking particularity). As we have ruled, however, the CO did not abuse his discretion in declining to consider Employer's letter of clarification on the ground that Employer should have presented this information at the time of the rebuttal.

Based on the foregoing, we find that the Final Determination properly stated grounds for denial of labor certification and that the CO did not abuse his discretion in denying reconsideration based on a clarifying letter presented with the request for Board review.

ORDER

The Certifying Officer's denial of labor certification is **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.
Petitions must be filed with:

Chief Docket Clerk
Office of the Administrative Law Judges
Board of Labor Certification Appeals
800 K St., N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.